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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 72-1633

COLUMBIA BROADCASTING SYSTEM, INC., CALVADA PRODUCTIONS, A JOINT VENTURE, JACK CHERTOK TELEVISION, INC., AND DENA PICTURES INCORPORATED,
Petitioners

v.

TELEPROMPTER CORPORATION AND CONLEY ELECTRONICS CORPORATION,
Respondents

On Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

PRELIMINARY STATEMENT

On October 9, 1973 the Court granted the Conditional Cross-Petition for a Writ of Certiorari filed by Columbia Broadcasting System (CBS) and other cross-petitioners [1] with respect to three issues as to which

[1] Hereinafter referred to as "CBS" for clarity in dealing with the two groups of parties and with the Petition in No. 72-1628 and this Conditional Cross-Petition.

"JA" refers to the printed Joint Appendix filed in this Court under Rule 36.1 in this case (No. 72-1633) and in No. 72-1628. "JE" refers to the printed Exhibit Volume of the Joint Appendix.

the Court of Appeals had affirmed the District Court. On the same day the Court granted the Petition for Certiorari filed by respondents herein (Teleprompter and Conley)[2] in No. 72-1628 respecting the issue as to which the Court of Appeals had reversed the District Court. Taken together, the two petitions present four of the issues decided by the Court of Appeals.

RESTATEMENT OF QUESTIONS PRESENTED

1. Was the reception by certain of Teleprompter's CATV systems of broadcasts on specific dates in 1964, 1969 and 1971 embodying CBS copyrighted works changed or converted into a "performance" under sections 1(c) and (d) of the Copyright Act, not by what the CATV did with reference to the reception and distribution of the broadcast signals but by reason of activity by the CATV on separate non-broadcast channels, which activity did not involve CBS copyrighted programs in any way?

2. Should the copyright monopoly be judicially extended to hold a CATV system liable for reception of broadcast signals because programs were originated by the CATV on non-broadcast channels in accordance with FCC regulations for CATV and where such extension of copyright monopoly would be in conflict with a key element in the FCC's regulatory scheme for CATV?

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[2] Hereinafter, for the same reason, referred to as "Teleprompter".

STATEMENT

The decision in this case may be of great significance in determining whether a large segment of the public can continue to use the services of CATV for reception of broadcasts. However, it necessarily must rest on the facts concerning the operation of Teleprompter's CATV systems in connection with the reception of the specific broadcasts of the copyrighted works alleged in the complaint. A holding that Teleprompter "performed" material copyrighted by CBS as alleged in the complaint can only result from the activities of the CATVs at the time of the broadcasts in question (November 1964, June 1969 and March 1971).

Much of CBS' brief relies extensively on facts outside the record, including references to news reports of developments long after the dates of alleged infringement as well as speculation as to future plans or capabilities of Teleprompter's CATV systems.[3] Moreover, CBS criticizes the courts below for comments on the paucity of facts in the record, claiming that the failure to rule on the hypothetical circumstances it wishes to interject "merely invites further litigation" (Br. p. 27). Under the circumstances, it is necessary to make a rather extensive statement in response to distinguish those facts in the record relevant to the determination of the issues from the extraneous "facts" relied on by CBS.

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[3] CBS also states the facts relating to activities of the specific CATV systems in such a fashion as to leave confusion on the relationship of these activities to the dates of alleged infringement. For example, CBS' statement asserts origination by the Rawlins CATV of "10 hours a week of programming typical of that originated by television broadcasters" (Br. p. 13); such origination by the CATV did not commence until several months after the alleged infringement. See n. 10 *infra*.

A. The issues in this Petition and the related Petition in No. 72-1628

CBS and the other petitioners[4] own copyrights in programs which CBS was authorized to broadcast or license for broadcast.[5] The CBS complaint asserted that the reception of broadcast signals by five of Teleprompter's CATV systems named in the complaint constituted a "performance" "in public" of the copyrighted works embodied in the broadcast signals. The issues raised by the CBS complaint fall into three categories:

First. CBS claimed that the signals received and distributed by the CATV systems were "distant signals" respecting which the CATV systems had to obtain copyright licenses. As to this issue, the Court of Appeals reversed the District Court and held such reception by three of Teleprompter's systems should be "deemed" to be a performance and hence an infringement. This issue is presented in petition no. 72-1628.

Second. CBS based part of its argument on the fact that the CATV systems used microwave links. CBS contended that such links transmitted signals through the air and changed the CATV systems' function into that of a broadcaster. Both the District Court and the Court of Appeals re-

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[4] The other petitioners are program producers who have granted to CBS for the period of the license "the exclusive right to broadcast or to authorize the broadcast" (including rebroadcasts) of copyrighted programs produced for CBS. JE 309, 325.

[5] The trial of this action was divided into stages pursuant to pretrial orders. JA 71-72, 101. The so-called basic copyright issue and the question whether the reception service was protected by a license implied-in-law were tried in the first stage separate from other issues and defenses. The validity of the copyrights was assumed for the first stage.

jected this CBS contention, finding that microwave is point-to-point transmission analogous to and an alternative to cable. CBS' contention as to microwave is not renewed in this Court except incidentally in connection with the "distant signal" issue.

In order to attract subscribers, the CATV systems advertised the fact that the system provided not only a broadcast-reception service but also made available to subscribers on non-broadcast channels programs originated by the CATV. CBS contended that such advertising demonstrated a change in function. This contention was also rejected by the courts below and is not renewed here as a separate question.

Third. The third category of contentions relates to origination of programs (and in one case the sale of commercials) and to interconnection of CATV systems for such origination on non-broadcast channels. None of the programs originated by the CATV systems involved any copyright owned by CBS or other petitioner. Both courts below held that activity on non-broadcast channels not involving the CBS copyrighted programs had no effect on the function of the CATV reception service. These issues are presented by CBS' Conditional Cross-Petition.

B. The authorized broadcasts of the copyrighted works and the reception of the broadcast signals by Teleprompter's CATVs

Most of the facts relevant to the issues posed in this petition were stipulated.

The copyrighted programs were broadcast by television stations pursuant to license by CBS (acting on

its own behalf and pursuant to contractual authority from the other petitioners). Teleprompter operates CATV systems in a number of communities. The complaint names five of its systems: Elmira, New York; New York City; Farmington, New Mexico; Rawlins, Wyoming; and Great Falls, Montana.[6] It alleges that on the pertinent dates in November 1964 (Farmington and Elmira), in June 1969 (Farmington, Great Falls, Rawlins and New York City), and in March 1971 (Farmington and New York City), these CATV systems infringed CBS' copyrights by receiving the broadcasts of the copyrighted programs and distributing those broadcast signals to subscribers.

The operation and equipment of Teleprompter's CATV systems named in the complaint are covered in detail in the two lengthy stipulations. JA 148-291. Each of the systems received off-the-air television signals broadcast by television stations and distributed those signals to subscribers' homes for viewing on their own sets. The broadcasts were received in their entirety and distributed instantaneously without editing to the subscribers.

The CATV systems use co-axial cable. Co-axial cable, as distinguished from ordinary wire, is capable of simultaneously transmitting signals of many different frequencies. Originally CATV amplifiers used in the distribution of the signals were technologically

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[6] CBS asserts that the complaint charges infringement by all of Teleprompter's CATV systems but that proof was limited to five "illustrative" systems to expedite trial. Br. p. 28. The complaint (as amended and supplemented) contains seventeen claims for relief, each of which relates to the reception of a broadcast of one of the copyrighted works on a specific day by one or more of the five systems named in the complaint. JA 1-27, 50-57, 87-91.

limited to one channel. The equipment was improved so that three channels could be handled; later five and then twelve channels could be distributed to subscribers.[7] JA 486-87.

At each of the relevant dates in 1964, 1969 and 1971, Teleprompter's CATV systems (cables, amplifiers and related equipment) had a capability of carrying more channels than the number of television stations which were being received. One or more of these channels not being used for the reception and distribution of broadcasts was used as a separate non-broadcast channel for the origination of programs.

C. Program origination on non-broadcast channels

The origination of programming by the CATV systems and the equipment used for that purpose[8] is described in detail in the stipulations. JA 193-202, 214-216, 229-233, 241-245, 254-259, 271-275, 281-290.

None of the programs originated by the CATV systems involved any of CBS' copyrighted programs. JA 164. The CATV systems were either the actual originator or obtained the right to distribute the originated program from the copyright owner. JA 164. A flat monthly charge (in the range of $5-$7) was made for the CATV service. No per program or separate or additional charge was made by the CATV systems for the originated programs. JA 162. The orig-

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[7] Modern CATV amplifying equipment is capable of distributing 20 or more channels. In addition, "converters" have been used to increase channel capacity in older equipment. See n. 12 *infra*.

[8] Some of the equipment used was not of a technical quality which would have permitted its use by a TV station. JA 472-74.

inated programs made up only a small portion of the entire service—consisting of reception and distribution of broadcasts plus origination—provided to subscribers by the CATV systems here involved.

The origination equipment was not used by the CATV systems in the reception of the allegedly infringed broadcasts. Neither the programs which were originated nor the origination equipment had anything to do with, or in any way interfered with or interrupted, the reception of broadcast signals and the distribution of those signals to the subscribers. JA 326, 472, 561, 562.

The programming originated by Teleprompter's CATV systems falls into two categories:

> First, *automated programs, e.g.,* a time and weather scan, where a camera is set automatically to scan a board which contains a thermometer, wind gauge, barometer (or similar equipment) and a clock. Other automated programs include a message wheel, *i.e.,* a wheel containing typed messages is slowly rotated in front of a camera. The New York CATV system also had a camera which scanned stock market quotations when the market was open and a news ticker.
>
> Second, *non-automatic programs, e.g.,* films, interviews, shows put on in the CATV's studio (if any) and local sports events.

Teleprompter's chief executive officer (Mr. Kahn) testified that Teleprompter's business was providing the "finest reception service available," and that this service was the source of income to Teleprompter's

CATV systems. JA 560, 562, 578. Improvement in reception is difficult to describe in words, so Teleprompter used various advertising devices to attract subscribers to try the reception service on the theory that many would stay subscribers after seeing the quality of reception provided by the CATV. JA 561, 563-64, 566-67, 574-76.

Prior to November 1964 the Farmington system had an "empty channel" not being used to receive television broadcasts. Mr. Kahn conceived the idea of originating programs to attract subscribers by offering variety on the channel not used for broadcast reception. JA 520-23, 560-66. The Farmington CATV advertised its service and included references to origination.

Farmington. In 1964 the Farmington CATV system had equipment capable of carrying 5 channels. It received and made available to subscribers the signals of 4 broadcast stations.

In November 1964 the service consisted of 96 hours per day of broadcast-reception service (4 stations 24 hours a day)[9] and 4½ hours per day of origination. The originated programs consisted of interviews with local officials and local sports figures, and films, consisting of both short subjects and some feature films. JA 193-194. The production of these programs and the showing of the movies was handled by CATV personnel on a part-time basis JA 523, 531.

In June of 1969 the Farmington CATV originated programs 3 hours per day (5 days a week) and had

[9] The CATV system operated 24 hours a day and received the signals of any TV station whenever it was broadcasting, whether or not the station broadcasted during the full 24 hour day.

added a time and weather scan on the non-broadcast channel when programs of the type described above were not being originated. JA 193. In addition the CATV system, at the request of the school board, and with the permission of the Albuquerque educational TV station, recorded four educational programs to be distributed at other times to classrooms and to be made available to subscribers. JA 198-99; JE 340-343.

In 1970 the Farmington CATV system was rebuilt with 12 channel equipment. On March 9, 1971, the date of the alleged infringement, the CATV service consisted of 192 hours per day of broadcast-reception service (8 channels receiving 9 stations (2 part time) 24 hours a day), plus four hours a day of originated programs (five days a week) and a message wheel on one non-broadcast channel, and an automated time and weather scan on another. (It also continued the distribution of the school programs.) JA 187, 267-268, 271-275.

Great Falls. In June of 1969, Great Falls was a 12 channel system. The service it offered consisted of 192 hours per day of broadcast-reception service (8 channels receiving 9 stations (2 part time) 24 hours a day) and two hours a day (five days a week) of program origination (films, interviews, etc.). An automated message wheel was used during the remainder of the time on the origination channel. It also offered a time and weather scan on a separate channel. JA 221, 229-233.

Rawlins. In June of 1969, Rawlins was a 12 channel system. The service it offered consisted of 144 hours per day of broadcast-reception service (6 stations 24

hours a day), and a time and weather scan on a separate non-broadcast channel.[10]

New York City. In June of 1969, the New York City CATV was a 12 channel system. The New York franchise requires the CATV to receive all eleven New York City stations and bars it from receiving non-New York stations. JE 390, 404.

In June 1969 the New York City CATV provided more than 200 hours per day of broadcast-reception service.[11] JA 247-248. On a separate channel the New York system originated about 5¾ hours per day of local and general interest programs; a time and weather scan was provided when it was not originating such programs. A newsticker and stockmarket quotations were scanned when an educational station was not received. JA 254-257.

In March 1971 the capacity of the New York City system had been increased to 13 channels by the use of a supplemental device called a "converter" attached to the TV set.[12] JA 251, 487-89. The CATV continued

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[10] The Rawlins CATV did not commence its origination of programs—two hours a day five days a week—until November 1969 (JA 241-43), not in June 1969 as CBS implies (Br. p. 13). On three occasions prior to June, it had originated individual programs (*i.e.*, election matters and a United Fund Telethon, in November 1968) on the non-broadcast channel on which it provided the time and weather service. JA 547-548.

[11] Eleven stations (2 part time) were received.

[12] There were two types of "converters" used. One had a capability of 12 channels and a newer model had a capability of 25 channels. While some subscribers had "converters" installed in 1969 and, therefore, had the capability of receiving 13 channels, the CATV system in fact used only 12 channels. JA 251, n*.

By March 1971 some subscribers were equipped with 25 channel converters, but a substantial number (2500) still had no converter and another 1000 had the 12 channel converter. JA 279, n*.

The New York City franchise required that by July 1971 the

to offer broadcast-reception service similar to that it provided in 1969. JA 276-77. It provided similar automated programming and originated 10 hours per day of general interest programming.[13] JA 287-291.

CBS' brief (pp. 10-11) makes a series of references to press reports of activities of the New York CATV since 1971 without in any way indicating the relevance of these reports to alleged infringement by reception of specific broadcasts in June 1969 and March 1971.[14]

The trial court concluded that

> "copyright liability for the 'reception service' should not be affected by what can be considered an unrelated function—program origination. . . . What Teleprompter is doing to CBS' copyrighted material, and other over-the-air broadcasts, is the

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system have 17 channel capacity: 11 channels for reception of New York City Stations; 2 channels for city use; 2 public channels and 2 company channels. JE 404. It also required the CATV to achieve 24 channel capacity by 1973. JE 401. The New York City CATV expected to achieve the 24 channel capacity by the use of the 25 channel converter. CBS' reference to the CATV's "capability to deliver programming over 25 channels" (Br. p. 10) is in error. The system never had more than 13 channel capacity at any relevant time. Moreover, the franchise required the system when it achieved 24 channel capacity to receive the 11 TV stations, provide 3 city channels, and 4 public channels. The remaining five were for use by the company.

[13] The sale of commercials involved in this case (see *infra* pp. 15-16) occurred in connection with one series of originated sports programs.

[14] In the courts below CBS also charged that Teleprompter's Elmira CATV system in 1964 performed a broadcast function by reason of program origination. In November 1964, the service of the Elmira CATV system consisted of 240 hours a day of broadcast-reception service (10 stations). It also had a time and weather scan and carried certain programs originated by the Elmira school system on a separate non-broadcast channel. JA 214-217. The CBS brief does not discuss Elmira.

> same whether the CATV's originate programs or not. The 'function' of the reception service is not changed by the simultaneous sale of original shows, just as it would not be changed by Teleprompter's simultaneous delivery of free ice cream or candy to every subscriber". JA 135-36, 355 F. Supp. at 629.

The court of appeals affirmed, stating "we do not agree with CBS' position that there is some sort of 'spillover' effect by which the system becomes a 'performer' with regard to its reception service". JA xxx; 476 F.2d at 348.

D. The so-called "interconnection"

The only evidence in the record relating to "interconnection" among Teleprompter CATV systems consists of two sporting events (Ali-Liston fights) which took place on February 25, 1964 and May 25, 1965. Teleprompter purchased rights to make these events available to subscribers via closed circuit. Through telephone company circuits the fights were carried to the Elmira, Farmington and Great Falls CATV systems where they were distributed on non-broadcast channels on the cable system to subscribers who chose to view them on their own sets. JA 258-259.

Teleprompter used these events as promotional devices to solicit subscribers. Teleprompter paid for the right to make the fights available on the CATV systems, but made no separate or additional charge to subscribers for this service. JA 259, 566, 567; JE 230-231.

The New York City franchise required Teleprompter's system to establish a standby capability to connect its system with two other New York systems

(not owned by Teleprompter). JE 402, JA 280-81. The purpose of this "interconnection" was to enable the city officials upon request to communicate at one time on public channels with all people in New York who were subscribers to one of the three CATV systems. JA 570. CBS cites no evidence in the record (and there is none) for its statement that this "interconnection" is part of "a national cable network set up by Teleprompter" (Br. p. 11). Indeed, the record shows that no "interconnection" was used in connection with the reception of the broadcast of any copyrighted program involved in this case. JA 483-484, 503, 508.

The trial court found that the "interconnection" did not "transform [Teleprompter's] present CATV systems into a broadcast network as [the CBS petitioners] suggest." JA 125, 355 F.Supp. at 625. The Court of Appeals agreed. JA xxxi, 476 F.2d at 348.

CBS refers to indications in the record regarding Teleprompter's hopes and plans for the future, including references to an "application to own and operate receiving stations for a domestic communications satellite", to create a network of cable systems through "interconnection" (Br. p. 28). FCC approval is required for any such plans. CBS has suggested no reason why such approval long after the events in 1964, 1969 or 1971 can have any bearing on the issue as to whether the operation of Teleprompter's CATV systems constituted a "performance" of CBS' programs on those dates.[15]

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[15] Similarly CBS has suggested no basis on which a press report of a news program originated by the New York City CATV system and made available to other CATV systems in October 1973 (Br. pp. 11, 28) can have any bearing on the issue of infringement in 1964, 1969 or 1971.

Teleprompter has gone into the business of producing programs which are licensed to CBS and TV stations and are also offered to CATV systems. JA 571. Referring to such programs as a "network package" (Br. p. 28) is CBS' own invention. Teleprompter referred to these programs offered for license to other CATVs simply as a "program package" of professional quality. JE 575-76, 589.

E. Sale of commercials on non-broadcast channels

The evidence shows one instance of a sale of advertising by Teleprompter's CATV systems, consisting of a contract entered into by the New York City CATV for one sale of commercials in connection with sports events on a non-broadcast channel. The New York City CATV bought the right to distribute certain Madison Square Garden events to its subscribers on a non-broadcast channel and the advertising contract provided for two 60 second commercials by the Schaefer Brewing Company per event. JA 284-87; JE 179-81, 235-41.

The District Court and the Court of Appeals both noted (JA 126-27, 355 F. Supp. at 626; JA xxx, 476 F.2d at 348) that these commercials were sold and carried on a non-broadcast channel and had nothing to do with broadcasts received by the system where the entire broadcast including commercials was made available to subscribers.

The FCC regulations relating to program origination by CATV systems are discussed *infra* at pp. 31-34. But it should be noted here that when the FCC adopted the rule requiring CATV systems with more than 3500 subscribers to originate programming on a non-broadcast channel, it authorized the CATV systems

to sell commercials in connection with the origination. The Commission recognized that the required program origination would be an expensive burden and concluded that

> "the public interest would be best served by permitting CATV operators to derive revenues from commercials to help defray the cost of their originations, or programming presented by others on leased channels, and provide the public with a new type of service—one where commercials occur only at natural intermissions or breaks in program material . . . ." [16]

The significance of the Commission's conclusion in this regard is shown by the fact that Teleprompter paid $1,500 per sports event for the right to make it available to subscribers on a non-broadcast channel and the gross amount receivable from the advertising amounted to $300 per event.[17] JA 285-286. Similarly, CBS refers (Br. p. 26) to Teleprompter's projection in 1969 that by 1974 the income from the sale of commercials

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[16] *First Report and Order on Community Antenna Television Systems,* 20 F.C.C. 2d 201, ¶ 17, at 208 (1969) (hereinafter cited as *"First Report and Order").* See also *id.* ¶¶ 31-38, at 215-218.

It was only in 1969 after the Commission's order that Teleprompter changed a firm policy against sale of commercials on originated programs and the one sale referred to above occurred. JA 576-578, 605-606.

[17] CBS refers to published reports concerning income from sale of commercials in 1972, more than a year after the alleged infringement in March 1971 (Br. pp. 11, 26 & n. 30). It fails to note that the advertising for the sports events is reported to be about half the cost for the closed circuit rights. The danger of reliance on such extraneous "facts" not reflected in a trial record is shown by published reports that Teleprompter has for financial reasons drastically reduced its budget for originations. *Forbes,* December 1, 1973, at 62-63.

would reach $2 million (for *all* of its systems, not just New York City CATV) but fails to mention that the projected cost of the program origination in 1974 was $10.5 million, more than five times the projected income. JE 592.

F. CBS' "broadband" assertions

Throughout its brief, CBS refers to "cable television stations" rather than CATV or cable systems, apparently with the objective of trying to demonstrate similarity between a CATV system and a broadcasting station by the use of the word "station".[13] Similarly, a major portion of CBS' argument (Br. pp. 20-22) is devoted to so-called admissions in speeches or statements by Mr. Kahn, then Teleprompter's chief executive officer, that the terms "CATV" and "cable television" were outmoded and should be replaced by "broadband communications." JE 26-152.

As CATV struggled to gain a foothold in business over the years, Mr. Kahn promoted CATV using public relations words and catchy imagery. Teleprompter's basic business was providing "the finest reception service available" (JA 560, 584), but in promoting CATV and particularly services which might be offered on non-broadcast channels, he used the terms "broadband" and "broadband communications systems" in a number of speeches. He did not invent those terms, but used them as a shorthand way to describe the channel capability of modern CATV systems and the possibility which this capability offered for the access, govern-

[13] CBS (Br. p. 21) apparently regards it as significant that Mr. Kahn was quoted in the press as referring to "cable television stations", a report which Mr. Kahn testified was a "misquote". JA 598-99.

ment, leased, and origination channels, a channel capability which the FCC now requires. Mr. Kahn made it clear that this capability is what he meant by the term "broadband communications".[19] JA 579-87. He also made clear that this was a promise for the future, not the present: "No one of our existing systems with the exception of two experimental ones we are building in California are today broad band." JA 580.

Finally, CBS makes much of conclusory testimony by "experts" regarding the function of Teleprompter's CATV systems in light of the activities described

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[19] The Comment of the Department of Justice from which CBS quotes which mentions cable television as contrasted to community antenna television (Br. p. 22) related to the Commission's proceedings regarding regulations respecting programs for which a per-program or per-channel charge would be made (Docket No. 19554). The Department referred to "broadband cable technology and its capacity for providing a wide variety of electronic services, many of which would be unrelated to television, without the use of scarce radio frequency spectrum." *Comments of the Department of Justice Before the Federal Communications Commission*, Docket No. 19554, at p. 15 (November 1, 1972).

The report of a recent conference convened to explore the development of CATV systems in this country concluded that

> "a cable system is capable of providing not only more channels of conventional television, but of carrying new kinds of programming and telecommunications services. . . .
>
> "Despite . . . [the interest of groups who believe cable can help them], cable today remains essentially a broadcast reception service. *What has changed is not the actual use of the cable, but the nature of the thinking about cable and its potential.* . . . If cable is to succeed in the top markets where 80% of the population lives (and where broadcast TV stations are plentiful and reception is generally good), systems will have to provide new services to attract urban subscribers."

Aspen Notebook on the Cable and Continuing Education, Part I, at 28 (ed. of Aspen Program on Communications and Society, 1973) (mimeographed preprint) (emphasis added).

above. Br. pp. 22, 26. This testimony, described by CBS as "factual conclusions" by "experienced broadcasters" and by its engineering witness regarding the similarity in "function" between Teleprompter's CATV systems and a broadcasting station, is in fact nothing more than the conclusory expression of the witnesses' opinions echoing CBS' legal contentions.

SUMMARY OF ARGUMENT

I. *Fortnightly* establishes that reception and distribution of broadcast signals to subscribing members of the public is not a "performance" of the broadcast work. CBS has pointed to no principle of law whereby the operation of a CATV reception service which does not constitute a "performance" becomes converted into a performance because of origination or other activity on separate non-broadcast channels which in no way involved the copyrighted works. Neither the operation nor the function of the reception service is changed by activity on separate non-broadcast channels.

The two incidents of "interconnection" among Teleprompter's CATVs for distribution of a special program on a non-broadcast channel in 1964 and 1965 are in reality merely a form of origination on a non-broadcast channel. Neither those events of interconnection, nor the one sale of commercials on a non-broadcast channel, changed or affected the separate reception function.

The formless "totality" theory of infringement proposed by CBS attempts to obscure the fact that there is no "totality" among the systems—the facts as to operations on non-broadcast channels vary from sys-

tem to system. More basically, the "totality" argument overlooks the fact that with respect to the reception of the broadcast and its distribution to subscribers, the CATV performed only a reception function and no function of a broadcaster. When Teleprompter's CATV systems originated programs on non-broadcast channels, they paid the copyright owner if his program was used.

II. The FCC's regulatory plan for integrating CATV into a national communications system includes the requirement that CATV systems be required to originate programs on a non-broadcast channel and also to provide non-broadcast channels for lease, for governmental access, and for educational use. In recognition of the expense of providing this service and these facilities on non-broadcast channels, the FCC has authorized CATV systems on a limited basis to sell commercials in connection with origination on non-broadcast channels. The FCC's plan includes encouragement of a CATV network using non-broadcast channels but its regulatory scheme also encompasses any development of such networks.

The Commission's regulation of CATV in the public interest would be supplanted by private regulation by copyright owners under the new judicial expansion of copyright sought by CBS. Moreover, such an expansion of the copyright monopoly would conflict with the FCC requirement of compulsory origination by CATV systems. The courts below correctly held that there was no "spillover" effect on the reception service from activities on non-broadcast channels, thus avoiding a conflict between a judicial enlargement of the copyright monopoly and the FCC regulation of CATV in the public interest.

ARGUMENT

I. THE COURTS BELOW CORRECTLY HELD THAT THE CATV RECEPTION SERVICE WAS SEPARATE FROM, AND NOT CONVERTED INTO A PERFORMANCE OF, THE BROADCAST SIGNALS BY REASON OF ORIGINATION, SALE OF COMMERCIALS, OR "INTERCONNECTION" ON SEPARATE NON-BROADCAST CHANNELS.

CBS' argument attempts to obscure the central issue: was the reception of a broadcast on specific dates in 1964, 1969 and 1971 embodying a copyrighted work changed or converted into a performance, not by what the CATV did with reference to the reception and distribution of the broadcast signals, but by reason of activity on separate non-broadcast channels not involving CBS' copyrights in any way? The issue must necessarily be tested and judged on the facts as to the operation of Teleprompter's CATV systems with respect to the specific broadcasts on the specific dates in question. CBS, to the contrary, rests much of its argument on "developments" occurring long after those dates as gleaned from press reports or from suppositions respecting possible or theoretical operations of CATV systems in the future.

The issue is not, as CBS asserts, whether there should be "immunity" for CATV reception service (Br. p. 14), but rather whether the reception and distribution of broadcast signals is a "performance" of the copyrighted works "in public" under the Copyright Act.

A. The broadcast reception function is separate from and in no way changed by origination on non-broadcast channels

This Court's decision in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), established that reception and distribution of broadcast sig-

nals to subscribers for viewing on their own sets did not constitute a "performance" of the broadcast programs within the meaning of the Copyright Act. CBS has pointed to no principle of law holding that activity such as CATV reception service which is not a "performance" can be changed into a performance because of extraneous activity not in any way involving the copyrighted work.

This Court's analysis in *Fortnightly* was based on its "determination of the function that CATV plays in the total process of television broadcasting and reception" (392 U.S. at 397) in which "broadcasters perform" and "[v]iewers do not perform" (*id.* at 398). The CATV system provided "a well-located antenna with an efficient connection to the viewer's television set" (*id.* at 399). Its function "has little in common with the function of broadcasters" (*id.* at 400).

The underlying principle of *Fortnightly* that "CATV operators, like viewers and unlike broadcasters, do not perform the [broadcast] programs that they receive and carry" (*id.* at 400-401), must necessarily serve as the basis for determining whether Teleprompter's CATV systems performed the broadcast program when they received the broadcast signals and distributed them to subscribers.[20] Teleprompter's

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[20] This Court's normal reservation in two footnotes (*id.* at 392 n. 6, 399 n. 25) that it was reaching its decision on the basis of the facts in the case arose because the copyright owners and *amici* made numerous and in some cases extravagant forecasts as to what CATV might be capable of doing in the future.

CBS here, for example (Br. p. 32 n. 36), asserts that CATV systems have the technical capability of deleting commercials from broadcast programs and substituting CATV commercials, and refers to deletion of commercials by CATV systems in Canada, without pointing out that in the United States such deletions are

systems performed exactly the same function with respect to the broadcasts of CBS' copyrighted works as the *Fortnightly* CATV systems did. Here as in *Fortnightly* the broadcasters procured the programs and broadcast them for public reception. The CATV system carried whatever broadcast it received and distributed the broadcast signals without editing to the subscribers' homes. If the CATV reception service in *Fortnightly* was not a performance, Teleprompter's CATV reception service is not a performance.

CBS has fastened on the fact that this Court referred to a broadcaster as an "active performer" and the viewer as a "passive beneficiary" (*id.* at 399), to argue that if the CATV performed some function in addition to the reception function, the reception function is changed and no longer "passive" in the process of broadcasting and reception. Thus CBS claims that the origination of programming by a CATV is "functionally equivalent" to broadcasting and that the CATV reception service thereby also becomes equivalent to broadcasting.

Whatever merit there is in comparing "functions" of broadcasters and CATV systems on activities separate from and unrelated to broadcast reception, it cannot obscure the fact that the reception function of the CATV with respect to broadcasts remains unchanged regardless of the additional and separate functions the CATV company was performing. The CATV reception function is no more changed into

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forbidden by the FCC. 47 C.F.R. § 76.55(b). As a result, there is, of course, no evidence in the record of any such CATV activity here, and in fact CBS stipulated that the entire broadcasts, including station identification and commercials, were received and distributed to subscribers by the CATV systems involved in this case. JA 158-59.

a broadcast function by these extraneous activities than it would be changed into a broadcasting function because a CATV happened to be owned by a broadcaster. JA 152, 262 (CBS ownership of 13 CATVs).

CBS argues that Teleprompter's CATV systems are not "passive beneficiaries" "on the viewer's side of the line" within the meaning of *Fortnightly* because "origination of programming, sale of commercials, interconnection into networks, and selection, procurement and distribution of programs to be viewed" (Br. p. 23) are characteristic operations of broadcasters. But this adds little to logical analysis. Teleprompter has never denied that its CATV systems "selected" and "procured" the programs to be originated on the non-broadcast channels. However, with respect to broadcasts received, Teleprompter did not select or procure the programs, nor have anything to do with the sale of commercials by the station, nor was there any "interconnection" or "CATV network" with respect to the reception of the broadcasts.

B. The sale of commercials and "interconnection" in conjunction with origination on non-broadcast channels does not change the broadcast reception function

Both the single sale of commercials by the New York City CATV and the "interconnection" in this case involved non-broadcast channels, and the courts below held that these activities did not change the reception service into a broadcast function. The courts reached this conclusion for the same reason that they held origination did not change the reception service. JA xxxi; 476 F.2d at 348.

CBS apparently recognizes its failure to establish the legal relevance of Teleprompter's very limited

sale of commercials and interconnection associated with CATV origination. CBS tries to shore up this argument by criticizing the courts below for failing to issue an opinion on the issue because the failure "merely invites further litigation" (Br. p. 27), and it also asserts, without foundation, that there were only a few instances of interconnection because proof was presented only with respect to five systems. CBS does talk of Teleprompter's plans for the future, and an "avowed step toward the establishment of an already planned network" by the filing of an application with the FCC to operate ground stations to receive satellite transmissions (Br. p. 28). These future "plans" turn on authorizations by the FCC and involve contingencies so numerous as to make prediction perilous. If the future course of development of the CATV industry does in fact pose new copyright issues, they should surely be dealt with in a new court proceeding at which the actual CATV development could be fully explored and subjected to regular fact-finding processes.

C. CBS' proposed new doctrine of performance by "Totality" is devoid of substance

CBS' major argument (Br. pp. 29-33) that Teleprompter's CATV reception of the broadcasts of the copyrighted works is "tainted" and converted into a performance is based on the alleged "functional equivalence" of the CATV system compared as a *totality* to a broadcaster. Both the District Court and the Court of Appeals focused on the acts of Teleprompter's CATV systems with respect to the copyrighted works. The District Court found that copyright liability should not be affected by an "unrelated function." JA 135; 355 F.Supp. at 629. The Court of Appeals

agreed. Equally, it refused to find any "spillover" effect from the sale of commercials "by which the system becomes a 'performer' with regard to its reception service." JA xxx; 476 F.2d at 348.

In making the "totality" contention, CBS paints with a broad brush and attempts to gloss over differences between the facts applicable to each of Teleprompter's five CATV systems. CBS argues, contrary to the record, that there is a "totality" applicable to all of these systems.

The *New York City* CATV system on which CBS particularly focuses (Br. p. 20) carried only New York City television stations (as required by its franchise) and never imported "distant signals." JE 390, 404. The New York City system was "transmitting signals through the air" (Br. p. 20) only to the extent that a microwave connection was used in lieu of cable to serve as the connection between the antenna sites in the city and two subsidiary equipment locations.[21] JA 252-253, 280-281. The only sale of commercials occurred in 1971. The only "interconnection" was a standby capability to connect with other New York City CATV systems as required by the franchise.

The *Farmington* CATV originated programming (both automated and non-automated) but did not sell any commercials.[22] The "interconnection" involved

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[21] In the courts below CBS argued that the use of microwave made Teleprompter's systems functionally equivalent to a broadcaster. This contention was rejected by both courts below on the ground that microwave is point-to-point communication analogous to, and used as an alternative to, a cable or wire. JA 119-120; 355 F.Supp. at 623; JA xxxi-xxxii; 476 F.2d at 348-349. CBS has not renewed the microwave contention in this petition.

[22] The "distant signal" issue with respect to Farmington, Great Falls and Rawlins is briefed in No. 72-1628.

carrying the Ali-Liston fights in February 1964 and May 1965, eight months before and six months after the alleged infringements in November 1964.

The facts as to the *Great Falls* CATV are similar to those for Farmington, except that the alleged infringement is in June 1969 so that the sole interconnection in the record is at least four years prior to the alleged infringement.

The *Rawlins* and *Elmira* CATVs had only automated programming at the time of the alleged infringements[28] and did not sell any commercials. Elmira carried the Ali-Liston fights.

Moreover, CBS' totality argument obscures the fact that it was the broadcast station which procured CBS' copyrighted programs, converted the images and sounds of the programs into electronic signals and broadcast those signals for public reception. Teleprompter's CATV systems merely received and carried those signals in their entirety, including the commercials the broadcaster sold. CBS' focus on the number of hours a broadcaster originates (Br. p. 10, 12, 13, 24) cannot obscure the fact that a broadcaster is responsible for, and must identify himself with, all programs he broadcasts whether he procures them from a network, or originates them in his own studio. (JE 493) No broadcasting television station performs the function of receiving broadcast signals off-the-air and

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[28] CBS discusses origination without referring to the concession during trial by CBS Vice President David M. Blank that it was "debatable" whether automated programming such as time and weather should be considered as programming in this context. JA 459-460. In addition, one of CBS' "experienced broadcaster" witnesses testified on cross-examination that he did not think of the automatic weather scan as program origination. JA 386-387.

distributing them unedited to subscribers. There is no similarity in function or responsibility as between activities of a broadcaster and Teleprompter's CATV systems so far as concerns the copyrighted programs.

In making its argument, CBS stresses that a subscriber pays a single fee for the CATV service and receives both the broadcast signals carried and the programs originated by the CATV. The reception service function constitutes the overwhelming and primary operation of the business of Teleprompter's CATV systems. The reception service, as measured by hours of broadcast reception available, subscriber interest and source of income, outweighed all other services. JA 533, 542-43, 549, 564-66. There was no change in the charge for the service because of a change in the amount of program origination. In fact the program origination provided an ancillary service to attract subscribers to the reception service; Teleprompter used all kinds of promotional devices on the assumption that if a member of the public once experienced the excellence of reception he would remain a subscriber. JA 523-24, 533, 542-43, 550, 560-62, 566, 574-78. The courts below found no change in function because the CATV systems made a single charge for reception of broadcast signals as well as for origination of programs. This Court should find none.

The reception service is discrete as to each channel of broadcast reception, and the broadcast reception function is equally discrete from the origination function. Origination on non-broadcast channels in no way interfered with or interrupted broadcast reception. The fact that the CATV as the originator on non-broadcast channels concededly performed the origi-

nated programs does not change its separate reception function as to broadcast programs.

CBS' reliance on *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917), and *Associated Music Publishers, Inc.* v. *Debs Memorial Radio Fund, Inc.*, 141 F.2d 852 (2d Cir.), *cert. denied* 323 U.S. 766 (1944), in support of its totality theory is misplaced. There was no question in those cases that the music was performed; rather, the sole issue was whether the performances were for profit. In *Herbert* the copyrighted compositions were performed "live" for the entertainment of guests during meal times. In *Associated Music Publishers* a phonograph record containing the copyrighted composition was broadcast over a radio station. Nothing in either case suggests that activity which is a non-performance can be transformed into a performance by activity unrelated to the copyrighted work.

United States v. *Midwest Video Corp.*, 406 U.S. 649 (1972), also cited by CBS (Br. p. 25 n. 29), involved a dispute as to authority of the Federal Communications Commission under the Communications Act to issue regulations requiring CATV systems with more than 3500 subscribers to originate programming on a non-broadcast channel. No question of copyright was involved. Comparisons by members of the Court in the separate opinions of the *origination* by CATV with *origination* by a broadcaster in no way suggests that the CATV origination tainted or changed the reception service so far as concerns copyright liability.

CBS relies heavily on opinion testimony by "experienced broadcasters" that petitioners' CATV systems are "functionally equivalent" to a broadcaster. Br. 24, 27. These "opinions" were no more than conclu-

sory statements echoing CBS' legal argument of "totality." Aside from the formless "totality" theory,[24] CBS has never suggested why the same reception service as that provided by the CATV in *Fortnightly* should be converted into a performance because of origination, sale of commercials or "interconnection" on unrelated non-broadcast channels.

When Teleprompter's CATV systems originated programs on non-broadcast channels, they paid the copyright owner if his program was used. Thus, if a CBS program had been used, CBS would have been paid. But CBS has made clear that its primary interest is not in reaping royalties on programs used in origination by CATV but to use copyright to freeze "the present system of nationwide program distribution by television stations through their affiliated stations . . . ." JE 470. In 1968 when the FCC was considering its proposed CATV rules, broadcasters urged that origination should be prohibited and advertising be barred.[25] The Commission rejected that position as without merit, pointing out that "we do not think that the public should be deprived of an opportunity for greater diversity merely because a broadening of selections may spread the audience and reduce the size of the audience for any particular selection."[26] Doubtless CBS would like to use copyright to supplant the FCC's regulation of CATV and to substitute its own restrictions to preserve what it regards as the present

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[24] CBS' engineer witness, on cross-examination as to the factors entering into his conclusion of "functional equivalence", stated that they could be "not ranked, but perhaps lumped." JA 345.

[25] *First Report and Order, supra* n. 16, ¶ 4, at 202.

[26] *Id.* ¶ 5, at 203.

network structure. This however is no basis for a judicial expansion of the copyright monopoly through adoption of a new and formless doctrine of "performance" by analogy and "totality."

II. CBS' CONTENTIONS CONFLICT WITH THE FCC REGULATORY PLAN FOR CATV

CBS gives short shrift in its brief to the FCC regulations applicable to CATV program origination. [illegible] pp. 22 n. 25, 23 n. 27. In contrast, both courts below noted that the FCC had adopted rules dealing with CATV origination, which require systems with more than 3500 subscribers to have their own program origination on a non-broadcast channel.[27] JA xxx n. 13, 476 F. 2d at 348 n. 13; JA 135, 355 F. Supp. at 629.

In 1968, when the Commission announced its major inquiry into CATV, it stated that it intended to consider CATV program origination "as a means for increasing the number of local outlets for community self-expression and for augmenting the public's choice of programs and types of service, without use of spectrum."[28] It also made clear that "interconnection of local cable systems" (which in reality is merely one aspect of program origination on non-broadcast channels) fell within the scope of its inquiry.[29]

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[27] The requirement of origination was suspended during judicial review. The Commission's regulatory authority was upheld in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972), but the suspension of the rule requiring origination has not yet been lifted by the FCC.

[28] *Notice of Proposed Rulemaking and Notice of Inquiry*, Docket No. 18397, 15 F.C.C. 2d 417, ¶ 5, at 418 (1968).

[29] *Id.*, ¶¶ 8-9, at 419-420.

In 1969 in its first major Report in the CATV inquiry, the Commission confirmed its tentative conclusion that "CATV program origination is in the public interest and should be encouraged." [30] Moreover, the Commission's plan was based on encouragement of CATV systems to make more non-broadcast channels available to others for program origination on a common carrier basis and also to provide public access channels.[31] This interrelated plan—involving CATV carriage of broadcast signals and other services to be provided on non-broadcast channels—was based on a recognition of

> "the great potential of the cable technology to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services . . . ." [32]

In that context the Commission considered possible interconnection of CATV systems, either in connection with the CATV origination or through use of the channels leased on a common carrier basis.[33] The Commission noted the additional service which the public might derive from a CATV network if one were to be established. It went on, however, to point out the difficulties in establishing such a CATV network, and concluded that should adverse consequences develop the Commission could and would take remedial

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[30] *First Report and Order*, *supra* n. 16, ¶ 3, at 202.

[31] *Id.*, ¶¶ 11-16, at 205-207.

[32] *Id.*, ¶ 3, at 202.

[33] *Id.*, ¶¶ 7-8, at 203-204.

or preventive action.[34] Finally, the Commission recognized that providing these services on non-broadcast channels would be expensive and concluded that it was in the public interest that CATV owners be permitted to sell commercials on non-broadcast originations to help defray the expense.[35]

In 1971 the Commission explained that its developing plan for CATV regulation involved a number of interlocking aspects, including "access to and use of nonbroadcast cable channels, [and] minimum channel capacity".[36] The Commission's plan for "integration of cable service into the nation's communications structure without undue disruption"[37] included not only one channel for non-automatic origination, but also minimum CATV channel capacity so that non-broadcast channels would be available for public use and access. The Commission also noted that a "nationwide interconnected cable network" was "far from imminent."[38] In this respect, the Commission said:

> "The type of interconnection and, most important, the cable penetration levels to permit the formation of a network capable of outbidding broadcast networks are far in the future. We intend to keep a close watch on this question and to take whatever action is called for within our jurisdiction."[39]

The Commission's integrated plan for CATV was embodied in regulations announced and explained in

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[34] *Id.*, ¶ 8, at 204; see also *id.*, ¶ 17, at 207-208.

[35] *Id.*

[36] *Letter of Intent (Cable Television Proposals)*, 31 F.C.C. 2d 115, 116 (1971).

[37] *Id.*, at 117.

[38] *Id.*, at 125.

[39] *Id.*

its 1972 *Cable Television Report and Order*,[40] where the Commission made clear that a condition of the carriage of broadcast signals was the obligation of CATV to provide non-broadcast channels for origination, for public access, education access and leased access.[41] The sale of commercials in connection with "origination cablecasting" was specifically permitted, although significantly restricted when compared to the commercials a broadcaster would carry.[42] 47 C.F.R. § 76.217.

Now CBS would have Teleprompter's CATV systems penalized. CBS proposes a new copyright rule which converts the CATV broadcast reception service into a "performance" and hence an infringement because the CATV systems were doing what the Commission wanted them to do in the public interest—*i.e.*, program origination on non-broadcast channels. Indeed, CATV origination in compliance with the Commission's compulsory origination rule would, CBS asserts, so "taint" the reception service that the CATV operations as a "totality" would become "functionally equivalent to a broadcaster."[43]

CBS' concern with a cable network is obvious. But "interconnection" between two CATV systems to permit simultaneous origination of the Ali-Liston fights in 1964 and 1965 at dates far removed from the alleged

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[40] 36 F.C.C. 2d 141 (1972).

[41] *Id.*, ¶¶ 121-25, at 190-92; 47 C.F.R. §§ 76.201, 76.251.

[42] For example, WCBS-TV New York, carried approximately 22 hours of commercials in a week in February 1971 out of a total broadcasting time of 161 hours. JA 265-66.

[43] CBS' contentions reach this ultimate position. CBS contends that the New York City CATV system infringed in June 1969 although, as CBS concedes (Br. p. 10), "[i]t did not import distant signals", and there was no "interconnection" and no sale of commercials in 1969 (see pp. 13-14, 15, 26 *supra*).

infringement hardly amount to such a "network". Moreover, the Commission has made clear that it wants to keep open the conditions which may permit the establishment in the future of a network either through interconnection with respect to non-broadcast CATV origination or origination on leased non-broadcast channels. The Commission has made equally clear this is a matter within its regulatory compass and that any such network which may develop will be controlled within the regulatory plan the Commission has developed for CATV.

CBS proposes to substitute for the FCC plan its own "regulation" using copyright in order to eliminate CATV origination and commercials and to prevent the emergence in the future of a CATV network which may be competitive with CBS operations. The enlargement of the copyright monopoly which it seeks will enable it to supplant the Commission's regulatory plan with its own scheme to preserve "the present system of nationwide program distribution by television networks through their affiliated stations . . . ." (JE 470.)

Such an enlargement of the copyright monopoly by judicial construction conflicts with the principles of statutory construction approved by this Court,[44] and would lead to an unconscionable result. A large number of CATV systems, including Teleprompter's systems, voluntarily complied with the Commission's requirement for origination and the provision of non-broadcast channels for lease and public access (*see* JE 158-59, 161-62), which requirements were upheld by this Court in *Midwest Video*. The entire reception

[44] See *Farmers Union* v. *WDAY*, 360 U.S. 525 (1959).

service of all of these systems would be subjected to copyright infringement and to the attendant potentially huge damage liability if CBS's contention were to be accepted.

We submit the courts below correctly held that Teleprompter CATV's program origination on separate channels (with the one related sale of commercials by the New York City CATV on a non-broadcast origination, and the two episodes of "interconnection") was a separate function. The conclusion that there is no "spillover effect" from that origination on non-broadcast channels correctly avoids a direct conflict between judicial enlargement of the copyright monopoly and the FCC regulations under the Communications Act.

CONCLUSION

The Department of Justice has said that "the major television networks have an economic interest in the limited number of channels of access to the public which the present television system provides; and this general interest clearly conflicts with the large-scale development of CATV as a means of access to the viewing public."[45] Adoption of the novel interpretation of the Copyright Act for which CBS contends would undermine the Federal Communications Commission's carefully drawn CATV regulatory plan and give the networks power to prevent CATV from providing the service on non-broadcast channels which the Commission has found to be in the public interest. An essential element of the Commission's "interlock-

[45] *Comments of the U.S. Department of Justice Before the Federal Communications Commission*, Docket No. 18397 at 21 n. 11 (1969) (investigation regarding ownership of CATV systems by broadcasters and other media).

ing" and "interwoven" plan for CATV was CATV origination and the provision of public access channels. This plan, which the Commission designed to get "cable moving so that the public may receive its benefits" [46] would be frustrated; the substitution of private regulation of cable by the networks through use of copyright for regulation in the public interest by the Commission would deny to the public the service which the Commission seeks to foster.

The decision below on these issues should be affirmed.

Respectfully submitted,

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[46] *Letter of Intent (Cable Television Proposals)*, 31 F.C.C.2d 115, 117 (1971).